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Supreme Court of the United States

OCTOBER TERM—1930.

No. 78.

MARSHALL L. MOTT, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF AMICI CURIAE

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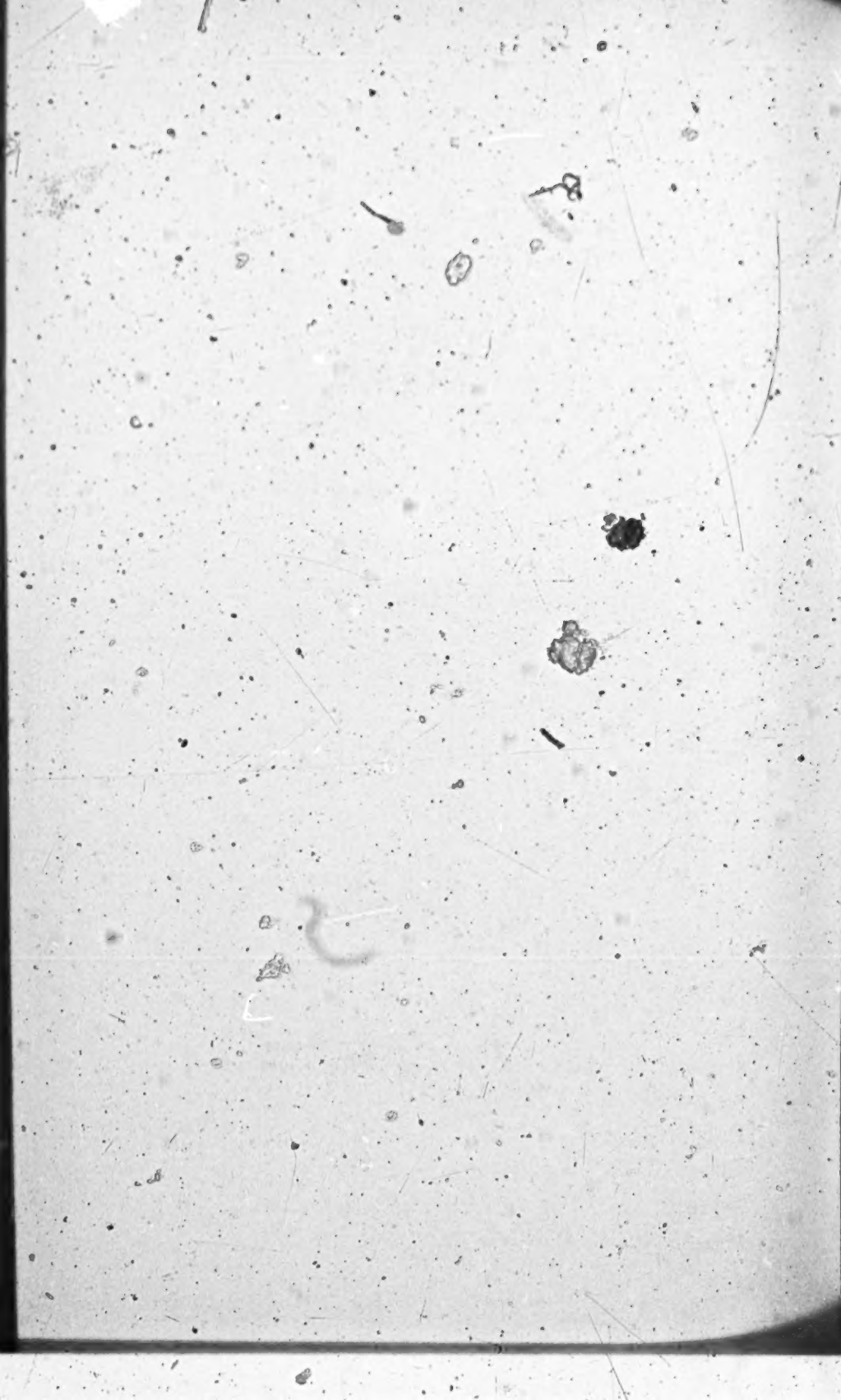

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BRIEF OF *AMICI CURIAE*.

Some of the signers of this brief are counsel for the plaintiff in the case of *Jackson Barnett, a mental incompetent, by Elmer S. Bailey, next friend,* v. *Riggs National Bank and others,* Equity No. 53,547, in the Supreme Court of the District of Columbia, which arises out of the same transaction which is involved in this case. Some of the signers are counsel and respondents in *United States* v. *Equitable Trust Company, et al.,* No. 21 of this term, which apparently has been thought to have such a relation to this case as to make it proper for this case to be advanced for argument immediately thereafter.

We therefore desire the opportunity of placing before

the court our views as to the nature and extent of the power of the Secretary of the Interior over Indian funds, in so far as that question is germane to the issues in these cases.

As preliminary thereto, it seems appropriate to give a succinct statement of what may fairly be termed the "Jackson Barnett litigation."

History of the Litigation.

Jackson Barnett is a full-blood Creek Indian. Upon the allotment of the tribal lands he received 160 acres in what is now Creek County, Oklahoma. An oil and gas lease of his allotment was made in 1912 by a guardian appointed by the County Court of Okmulgee County, Oklahoma, and approved by the Secretary of the Interior (Record in *United States* v. *Equitable Trust Co.*, pp. 14-20). The lease provided that the royalties should be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma (id. 14), which office subsequently was abolished and the office of Superintendent for the Five Civilized Tribes created in lieu thereof. By 1920 the royalties had accumulated to the extent of approximately $1,000,000, and had been invested in United States Liberty Bonds which were held by the Secretary of the Interior.

In February, 1920, a marriage ceremony was performed between Barnett and a white woman named Anna Laura Lowe.

In February, 1923, $1,100,000 of Liberty Bonds, representing investment of the royalties, were distributed by the Secretary upon the basis of a thumb-marked letter of Jackson Barnett addressed to the Secretary and approved by him. The wife received $550,000 of the bonds, and the

other $550,000 were turned over to The Equitable Trust Company of New York under a trust under which they ultimately were to go to American Baptist Home Mission Society. Of the bonds given to the wife, $150,000 were transferred by her to Harold C. McGugin, her attorney, and McGugin in turn transferred $15,000 thereof to Marshall L. Mott, the petitioner in this case. The wife also placed $200,000 of the bonds transferred to her in a trust with Riggs National Bank in Washington, D. C.

After this distribution was made, the original guardian, Carl J. O'Hornett, resigned, and the County Court of Okmulgee County appointed Elmer S. Bailey as his successor.

Bailey caused a suit to be brought, in the name of Barnett by himself as *prochein ami*, for the recovery of the $550,000 of bonds transferred to Equitable Trust Company, and that suit has been successfully tried in the District Court of the United States for the Southern District of New York. It will be found in the reports in 21 Fed. 2d, 325, appeal dismissed, 26 Fed. 2d, 350, certiorari denied, 278 U. S. 626.

Bailey also caused a like suit to be brought for the recovery of the $200,000 of bonds placed in trust with Riggs National Bank. That case has not yet been tried and is now pending, as above stated, in the Supreme Court of the District of Columbia as Equity No. 53,547. The United States intervened in that case and then brought a separate suit which was consolidated with it.

The United States brought a suit against McGugin and its bill was dismissed upon motion in 28 Fed. 2d, 76.

The United States also brought a suit against Mr. Mott. It was unsuccessful in the District Court, 33 Fed. 2d, 340,

but prevailed in the Circuit Court of Appeals, 37 Fed. 2d, 860. That is the suit which is now here on certiorari.

The two opinions sustaining the right of recovery are thus to be found in 21 Fed. 2d, 325, and 37 Fed. 2d, 860. A comparison of the two opinions will show that the two courts, while reaching the same result, adopted somewhat different lines of reasoning. Thus the decision of the District Court for the Southern District of New York went upon the ground that the attempted gift by Barnett was voidable, notwithstanding the approval of the Secretary of the Interior, because of the mental incapacity of Barnett to express a valid assent, while the Circuit Court of Appeals for the Tenth Circuit, in the case at bar, held that entirely aside from the question of Barnett's mental capacity and granting the power of the Secretary of the Interior to remove restrictions, that official had no power to assent to a disposal of the funds to others or upon terms which took from the Indian all property right in the principal and denied him its full interest yield.

The Applicable Statutes.

The allotment of the Creek lands vested in the allottees a full and complete fee simple title to the land (*Jefferson* v. *Fink*, 247 U. S. 288, 289, 294) and gave them such a right of property therein that Congress itself could not now take their land away from them (*English* v. *Richardson*, 224 U. S. 680). Their right of alienation, however, was restricted for a period of five years (Act of March 1, 1901, 31 Stat. 861, c. 676, § 7; Act of June 30, 1902, 32 Stat. 500, c. 1323, § 16, known as the *Original Creek Agreement* and *Supplemental Creek Agreement*, respectively).

By an Act of April 21, 1904 (33 Stat. 189, c. 1402), all restrictions upon alienation of lands of allottees who are

not of Indian blood were removed, except minors and except as to homesteads, and the Secretary of the Interior was given authority to remove restrictions upon adult allottees of Indian blood.

Congress then passed the Act of April 26, 1906 (34 Stat. 137, c. 1876), by § 19 of which it was provided that no full-blood Indian should have power to alienate or encumber any of the lands allotted to him for a period of *twenty-five years* "unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress." Thus, so far as full-bloods were concerned, the restriction upon alienation was extended to *April 26, 1931*, and the power to remove restrictions, which had been conferred upon the Secretary by the Act of April 21, 1904, was taken away from the Secretary and retained in the control of Congress itself.

In the meantime, however, Congress had enacted another statute which completed its gradual process of subjecting the Indians to the jurisdiction of the Territorial courts and to the laws which Congress put in force in the Indian Territory*. That statute is the Act of April 28, 1904 (33 Stat. 574, c. 1824), which provided as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and *ex-*

*As early as 1877 the Indian Territory was for judicial purposes attached to the Western District of Arkansas. In 1883 a part of the Territory was annexed to the Western District of Kansas and another part of the Northern District of Texas. In 1889 Congress established a United States Court in the Indian Territory (Act of March 1, 1889, 25 Stat. 783). *At first, however, that court was given no jurisdiction over Indians. They were left subject to the tribal laws and the tribal courts.* By subsequent acts the jurisdiction of the United States court was enlarged, the tribal courts and tribal laws were abolished, certain of the general laws of Arkansas were put in force in the Indian Territory, and the Territorial court was authorized to exercise the powers of courts of probate (Act of May 2, 1890, 26 Stat. 81; Act of March 1, 1895, 28 Stat. 693; Act of June 7, 1897, 30 Stat. 62). There then followed the Act of April 28, 1904, quoted in the text, by which, as above stated, the process of subjecting the Indians and their property to local laws and local courts was completed.

tended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, *the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.*"

In connection with the policy of Congress in thus subjecting the Indians to the jurisdiction of the local courts established by Congress, it is significant to note that in Section 20 of the Act of April 26, 1906, above referred to, Congress had provided that "allotments of minors and incompetents may be rented or leased under order of the proper court," and consequently leases by minors or incompetents, made after the effective date of the Act of April 26, 1906, were void unless approved by the court, even though approved by the Secretary (*Morrison* v. *Burnette,* 154 Fed. 617, 620-622; *Jennings* v. *Wood,* 192 Fed. 507; *Robinson* v. *Long Gas Co.,* 221 Fed. 398, 401).

When Oklahoma became a State, in 1907, its courts of original jurisdiction became the successors of the Territorial courts, and the persons and estates of Indians were made subject to the laws of Oklahoma except as otherwise expressly provided by Congress (§ 19 of Act of June 16, 1906, 34 Stat. 267, c. 3335, called the Enabling Act); and since the admission of Oklahoma to statehood the County Courts of that State have exercised and now possess the jurisdiction formerly exercised by the United States Courts of the Indian Territory (*Yarhola* v. *Strough,* 166 Pac. 729; *Lytle* v. *Fulotka,* 233 Pac. 456; *Harris* v. *Bell,* 254 U. S. 103, 111, affirming 250 Fed. 209, 215).

It was in this situation that Congress passed the Act of May 27, 1908 (35 Stat. 312, c. 199).

Section 1 of that Act deals with restrictions on alienation. Its provisions as to Indians of less than full blood may be laid aside as not here material. As to allotted lands of full bloods, it provides that they shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April 26, 1931,

> "*except* that the Secretary of the Interior may remove such restrictions, *wholly or in part,* under such rules and regulations concerning *terms of sale and disposal of the proceeds* for the *benefit* of the respective Indians as he may prescribe."

Section 2 of that Act deals with leases of restricted lands, and we quote it in full with italics to emphasize features which we think it important to note:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, *or by guardian or curator under order of the proper probate court if a minor or incompetent,* for a period not to exceed five years, without the privilege of renewal; *Provided,* That leases of restricted lands *for oil, gas or other mining purposes,* leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, *may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents* shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of eighteen years."

The entire jurisdiction and power of the Secretary under the Act of May 27, 1908, is thus limited to two things: He may remove restrictions, and he may approve or disapprove (*a*) oil and gas leases, (*b*) leases of more than five years, (*c*) leases of homesteads of over one year. Subject to that power, the jurisdiction of the probate courts of Oklahoma over minor and incompetent Indians is full and complete. It was made so by the Act of April 28, 1904, quoted above, and is so recognized in the Act of May 27, 1908, itself.

The jurisdiction of the Oklahoma Courts over incompetent members of the Five Civilized Tribes.

It will be convenient at this point, we think, to clear up some confusion which seems to exist as to the term "incompetent" as applied to full-blood Indians of the Five Civilized Tribes. There is nothing in the legislation with respect to those Tribes which authorizes the Secretary to make determinations as to the "competency" of the respective members thereof, such as are provided for in the legislation with respect to other tribes (See *La Motte* v. *United States*, 254 U. S. 570, as to the Osages, and *United States* v. *Debell*, 227 Fed. 760, as to the Sioux.) It is true, of course, that the reason why Congress restricted the alienation of lands allotted to the Five Civilized Tribes is that those Indians, as a class, were regarded as unable to cope with their white neighbors in business transactions and as needing safeguards against both the greed of others and their own improvidence. It is true, also, that the provisions in the Acts of 1904, 1906, and 1908, removing certain restrictions on alienation, show that, in a broad and

general sense, Congress has regarded *quantum* of Indian blood as some indication of the capacity of members of those tribes to look out for themselves. *But Congress has not classed all full-blood Indians as mental incompetents. The mere existence of restrictions on alienation is not in itself an indication of mental incapacity.* On the contrary, full-blood Indians of the Five Civilized Tribes constantly are making contracts and being held bound by them, and by the express terms of Section 2 of the Act of May 27, 1908, adult full-bloods may make leases of their allotments for a period not to exceed five years (other than oil and gas leases) without the approval or guidance of the Secretary or any court. Congress thus expressly recognized that some full-bloods have contractual capacity, and the statement of the Circuit Court of Appeals in this case that the provisions of the Act of May 27, 1908, in and of themselves "established Barnett's legal incompetency to manage his own affairs" (37 Fed. 2d, 862) is erroneous.

Congress has further recognized, however, that among these Indians, as among white people, there are particular individuals of such defective mentality as to require an individual guardianship in addition to the general so-called guardianship which the United States, as a government, maintains toward all Indians in general. The same need for such particular and individual guardianship has been recognized and provided for in the case of minors; *and with respect to both minors and incompetents Congress has confided that individual guardianship to the local courts by conferring upon them jurisdiction to appoint individual guardians for all minors and for those adult Indians whom those courts find to be of such defective mentality as to need individual guardianship.* That jurisdic-

tion existed under the Acts of April 28, 1904, and of April 26, 1906, and was continued by the Act of May 27, 1908.

This was specifically decided in *Yarhola* v. *Strough*, 64 Okla. 195, 166 Pac. 729 (1917), to which the United States was a party. One of the County Courts of Oklahoma had found a full-blood Creek to be incompetent and had appointed a guardian. The Indian *and the United States* moved to discharge the guardian on the ground that the court was without jurisdiction, and in affirming a denial of that motion the Supreme Court of Oklahoma said (166 Pac. 730):

> "In support of their first contention counsel cite many cases to the effect that, the relation of a full-blood Creek Indian to the United States resembles that of a ward to the guardian, and argue from this, if we understand counsel's position correctly, that inasmuch as the United States occupies the relation of guardian toward Lessey Yarhola, the county court had no jurisdiction to appoint another guardian for her. We are unable to agree with the conclusion reached by counsel. Whilst it is quite true that these full-blood Indians are yet wards of the Nation in the sense stated by the cases cited, *yet the guardianship which the government has maintained over them must necessarily be performed through such instrumentalities or persons as provided for by the Congress.* In this jurisdiction these duties in the main, if not quite wholly, are intrusted to the Secretary of the Interior *and the county courts of the state.*
>
> "No useful purpose can be subserved by reviewing at length the various acts of Congress which authorize the county courts of the state to appoint guardians for incompetent Indians. *It is sufficient to say on this point that there are many of them, and their purpose*

and import is so clear that a casual reading of them settles definitely the question in favor of jurisdiction.

"There are many essential duties which may be performed by the guardian for a ward in the condition of Lessey Yarhola that do not in the slightest degree conflict with any duty toward her which by law are to be performed by the Department of the Interior. *The Department of the Interior has never been directly charged with the duty of caring for the estate of minors or incompetents or their education or maintenance. Such duties as these have always been performed by guardians appointed by the state or territorial courts.* It seems quite clear to us that Congress has expressly authorized the county courts of the state to appoint guardians for full-blood Creek incompetents, and we are unable to see any inconsistency between the exercise of this power by the state courts and the general guardianship of the government. The scope of the duties and authority of a guardian appointed for incompetent Indians by the county court not being involved herein, we do not attempt to determine the same, or define the zone within which he may act without coming in conflict with the authority of the Secretary of the Interior.

"Upon the question of the competency of Lessey Yarhola it is sufficient to say that we have examined the record very carefully, and believe the findings of the county and district court on that question are sufficiently supported by the evidence. As we have said before, an honest and efficient guardian can be of great benefit and assistance to Lessey Yarhola, not only in the matter of her personal care and education, but in the preservation and care of her large estate."

As that case was decided in 1917 and involved the construction of Acts of Congress, and especially as the United States was a party to it, there properly may be said of it what this court said in *Ewert* v. *Bluejacket*, 259 U. S. 129,

137, of a prior decision by a Circuit Court of Appeals construing another Act of Congress, viz.:

> "This decision was rendered over ten years ago and if it had been deemed an erroneous construction of the act, Congress would no doubt have long since modified it."

The doctrine of *Yarhola* v. *Strough* was reaffirmed in 1925 in the case of *Lytle* v. *Fulotka*, 106 Okla. 86, 233 Pac. 456, 457, in which the Supreme Court of Oklahoma again said:

> "The probate courts of the state of Oklahoma have jurisdiction to sell the inherited lands of incompetent, adult, full-blood Indians of the Five Civilized Tribes. It is contended that section 6 of the Act of May 27, 1908 (35 Stat. 313), grants jurisdiction to the probate courts of the state of Oklahoma only in the case of *minor* allottees. Said section is limited by its terms to minors and minor allottees, but the probate courts of this state and former Indian Territory have habitually exercised probate jurisdiction, not only over the estates of minor allottees, but of minor heirs as well. *Yarhola* v. *Strough*, 64 Okla. 195, 166 P. 729. Section 6 of such act is *not the source of jurisdiction* of the probate courts of the State of Oklahoma over the *estates of Indian minors*. It is merely declaratory of the law as it had existed since the passage of the Act of April 28, 1904 (chapter 1824, 33 Stat. 573), if not before. By that act, it was provided:
>
> 'And full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of *minors and incompetents*, whether Indian, freedman or otherwise.'
>
> "Thus, full probate jurisdiction was granted to the district courts of Indian territory over the estates of

decedents, minors, *and incompetents*, 'whether Indian, freedman or otherwise.' Morrison *v.* Burnette, 154 F. 617, 83 C. C. A. 391; Jennings *v.* Wood, 192 F. 507, 112 C. C. A. 657; Robinson *v.* Long Gas Co., 221 F. 398, 136 C. C. A. 642; Cowles *v.* Lee, 35 Okla. 159, 128 P. 688; Wellsville Oil Co. *v.* Miller, 44 Okla. 493, 145 P. 344.

"Upon the admission of the state into the Union, this jurisdiction was, by virtue of the Constitution and enabling act, conferred upon the probate courts of the state. *Congress recognized the jurisdiction of the probate courts over the estates of incompetents by Section 2 of the Act of May 27, 1908, when, in providing for the leasing of restricted lands for oil and gas, it added this proviso*:

> 'And provided further that the jurisdiction of the probate courts of the state of Oklahoma, over lands of *minors and incompetents* shall be subject to the foregoing provisions.'"

In exercising their jurisdiction over minor and incompetent Indians the courts of Oklahoma are of course acting under authority of Congress and *as Federal agencies;* and hence the assertion of their jurisdiction involves no assertion of any conflict between State power and Federal power, nor the assertion of any right in a State to direct or control Indian affairs or Indian property.

Parker v. *Richard*, 250 U. S. 235, 238, 239.
United States v. *Gypsy Oil Co.*, 10 Fed. 2d, 487, 491, 492.
Priddy v. *Thompson*, 204 Fed. 955, 958.
Chisholm v. *Creek & Indiana Development Co.*, 273 Fed. 589, affirmed 282 Fed. 93, reversed in part 264 U. S. 488.

It is a matter of grave doubt, we submit, whether the Secretary has authority to take or hold royalties under an oil and gas lease of Creek allotments.* In the Act of May 27, 1908, Congress dealt with removal of restrictions on alienation in one section and dealt with the approval of leases in another section. The fair inference, therefore, is that Congress recognized that the two things are distinct and intended to draw a distinction between them, and that the failure to repeat in Section 2 the language found in Section 1—"under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe"—was the manifestation of a deliberate intent that the power as to leases conferred by Section 2 should be narrower than the power as to removal of restrictions conferred by Section 1, *i. e.*, that the "rules and regulations" contemplated by Section 2 are rules and regulations relating to the *approval* of the lease, and that the power to make rules and regulations "concerning terms of sale and disposal of the proceeds" *of the lease* was impliedly withheld.

But even if the Secretary's requirement that royalties be paid to and retained by him until he sees fit to surrender them to the Indian be valid as to *adult* and *competent* Indians, such requirement, we submit, is clearly invalid as to *minor* and *incompetent* Indians, because, as to such Indians, such requirement constitutes an unlawful assumption by the Secretary of powers and duties conferred by Congress upon the probate courts, acting through guardians duly appointed by them. That conclusion seems to follow

*The question whether the Secretary has such authority undoubtedly "lurked in the record" in *Parker* v. *Richard*, 250 U. S. 235, but as it was not actually raised we believe the question still remains undecided (*Webster* v. *Fall*, 266 U. S. 507, 511), and it is for that reason we suggest the question although it is not necessary to decide it in this case.

from the general rule that "a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property", which rule obtains in Oklahoma and has been adverted to by this court in construing the Act of May 27, 1908 (*Harris* v. *Bell*, 254 U. S. 103, 112).

The power of the Secretary of the Interior to dispose of funds belonging to an incompetent Indian.

Assuming, however, that the Secretary's power, even with respect to a minor or incompetent Indian, is such as to authorize him to *receive* and *hold* the royalties until he sees fit to release them, the question remains as to the nature and extent of his power over their *disposal* when he makes his determination to release them. And that is the crux of the issue in this case.

With respect to the funds of an *adult* and *competent* Indian, the Secretary, when he decides to release them, obviously may pay them to the Indian or to such person as the Indian may direct—to him or upon his order; and we think there can be no possible doubt that, in the absence of fraud practiced *by* or *upon* the Secretary, such a payment of the funds would be of unquestionable validity. If an adult and competent Indian desires to make a gift to his wife or to charity, he has the right to do so if the Secretary approve, *i. e.*, if the Secretary be willing to remove the restriction upon alienation; and if the Indian have a full appreciation of what he is doing, we think there is nothing to prevent the Secretary from removing the restriction on alienation by giving his approval to such a gift.

But with respect to the funds of a *minor* or *incompe-*

tent Indian, the lack of any contractual capacity in the owner of the fund prevents the Secretary from ever having before him a valid order or consent or direction for payment; and although the Secretary's power and authority to remove the restriction on alienation be just as complete and absolute as it is with respect to the funds of an adult and competent Indian, his act in removing the restriction cannot make the payment valid because the payment still lacks the essential element of a valid direction or consent by the owner of the fund. In other words, a minor or incompetent Indian is incapable of having a legally valid desire or intent to make a gift to his wife or to a charity or to anyone else, and although the minority or incompetency of the Indian does not in any way lessen the Secretary's authority to remove the restriction on alienation, it prevents his removal of that restriction from effectuating a valid gift.

Stated in another form, the Secretary has complete power to remove restrictions on alienation by approving deeds and other conveyances, regardless of whether those conveyances be for a valuable consideration or entirely voluntary; but he cannot supply any defect in a deed or conveyance other than the requisite that he approve it. If a request for payment or a proposed contract, when submitted to him, be invalid (void or voidable) upon any ground other than the fact that it lacks his approval, it still has the same status in that respect after his approval that it had before. His approval of it does not in any way change its status except in the respect that by his approval the restriction on alienation is removed.

An authority directly in point is *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th Circuit). In that case, a *minor* allottee of the Cherokee tribe (which, like the Creek, is one of the

Five Civilized Tribes) made an oil and gas lease which was approved by the Secretary; and the lease was cancelled on the ground that a minor is *incapable of contracting,* even though the Secretary had undertaken to find as a fact that the minor was of age at the time the lease was made. The statute under which the Secretary acted in that case provided that such leases might be made "with the approval of the Secretary of the Interior and not otherwise", and hence is practically identical with the Act of May 27, 1908. The contention was pressed in that case that the Secretary's approval of the lease was the act of a tribunal exercising judicial power and necessarily involved the contractual capacity of the lessor, and that his finding that she was of age was conclusive. That contention was rejected and the court said (p. 208):

> "The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. *He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases.* If an Indian did not desire to lease there was *nothing for the Secretary to act upon;* if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and *they must have been competent to make the contract submitted for approval.* A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard

for his protection. It would not, however, reach back and supply or confirm all the essential legal prerequisites of a valid contract. *It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally* or that he belonged to the class or his land was of the character covered by the statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as a lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did, his decision would not be conclusive."

That case was decided in 1911, and thus there can be said of it precisely what was said in *Ewert* v. *Bluejacket*, 259 U. S. 129, 137, with reference to another decision by the same court in construing another Act of Congress:

> "This decision was rendered over ten years ago and if it had been deemed an erroneous construction of the Act, Congress would no doubt have long since modified it."

In *Kendall* v. *Ewert*, 259 U. S. 139, the District Court had dismissed a suit which had been brought to declare void a deed from an Indian to a special assistant to the Attorney General. After that decision, the grantee paid the Indian $700 for *a quitclaim deed* and a stipulation to dismiss the action with prejudice. He then moved to dismiss the Indian's appeal from the District Court's decision, and the Indian moved to cancel the stipulation as having been procured by fraud and without notice to his

counsel. The Circuit Court of Appeals, after an investigation, dismissed the Indian's appeal. A further appeal was then taken to this court, and this court reviewed the evidence as to the mental incapacity of the Indian and said (p. 148):

> "Upon a full review of the evidence as it is now before us, we do not hesitate to conclude that Redeagle was *not competent* to contract as, in form, he did in the stipulation to dismiss and that it must, therefore, be decreed to be void, notwithstanding the fact that at the time Ewert was not in the employ of the Government."

The court then further said (pp. 148, 149):

> "But, it is argued, the quit-claim deed for the land executed at the same time as this stipulation, on July 5, 1918, was *approved by the Assistant Secretary of the Interior* on January 27, 1922, as appears by the copy filed with the clerk of this court, and that the doctrine of relation makes this deed effective from its date.
>
> "*Of this it would be enough to say that Redeagle was no more competent to make this deed than he was to make the stipulation which we have just held to be void,* but we may add that the doctrine of relation is a legal fiction, resorted to for the purpose of accomplishing justice, 'to prevent a just and equitable title from being interrupted by claims which have no foundation in equity.' *Lykins* v. *McGrath,* 184 U. S. 169, 171; *Pickering* v. *Lomax,* 145 U. S. 310; *Lomax* v. *Pickering,* 173 U. S. 26; *Peyton* v. *Desmond,* 129 Fed. 1, 11. Obviously such a doctrine cannot be resorted to to give validity to a deed obtained under conditions such as we are considering,—it cannot take root in such a soil. We cannot know what disclosure of the conditions under which it was executed was made to

the Department when the deed was approved, but we do not doubt that if a full disclosure had been made approval would not have been given, *and the deed must be decreed to be void.*".

That, therefore, is a case in which this court held that a conveyance by a mentally incompetent Indian was void *because of his incompetency* even though it had been approved by the Secretary. The court did *not* place its decision upon the ground of any lack of power in the Secretary to remove restrictions because the consideration for the deed was inadequate and hence the deed was not for the "benefit" of the Indian.

Considering all the legislation together, the correct view thus seems to us to be this: The Secretary has absolute and unlimited authority to remove restrictions "wholly or in part" with respect to the funds of both adult and competent Indians and of minor and incompetent Indians. When he decides to remove the restriction from the property of an adult and competent Indian, that property may and must be disbursed or conveyed either to the Indian or to such person as the Indian may direct, for the Indian is the owner of the fund and has the absolute right to dispose thereof whenever the Secretary decides to remove the restriction. But when the Secretary decides to remove the restriction from the property of a *minor* or *incompetent* Indian, that property *must* be disbursed or conveyed to a *guardian* of such minor or incompetent Indian, for although the minor or incompetent is the owner of the fund he lacks the contractual capacity necessary to enable him either to receive or to disburse or convey the property; and if the Secretary assume to disburse or convey the property to anyone other than such a guardian, the conveyance necessarily is void, not because the

Secretary did not have authority to remove the restriction, but because the owner never made or consented to the conveyance.*

That is the view of the law upon which Judge KNOX proceeded in *Barnett* v. *Equitable Trust Co.*, 21 Fed. 2d, 325, 326, and it is necessitated, we think, by the fact that Congress has confided to the probate courts of Oklahoma jurisdiction over the estates of both minor and incompetent Indians. That jurisdiction of the courts is subject, of course, to the power of the Secretary to refrain from removing restrictions; but when the Secretary removes them, the jurisdiction of the court, through guardians appointed by it, at once attaches.

The view expressed in the opinion of the Circuit Court of Appeals in the case at bar (37 Fed. 2d, 860) is erroneous, we think, in that it places unwarranted limitations both upon the power of the Secretary and upon the power of the Indian who owns the fund and completely ignores the jurisdiction of the probate courts. Under the view there expressed, it would seem that no Indian, no matter what heights of intelligence and education he might achieve, could ever make a gift of a single dollar out of his restricted funds, even though the Secretary approve, or that the courts in each instance are to supervise the Secretary's determination as to what is for the *benefit* of

*For a long period of years the Secretary himself recognized that he had no authority to disburse the funds of minors and incompetents to anyone other than their guardian. His regulations so provided (record in *United States* v. *Equitable Trust Co.*, No. 21, pp. 4, 71, 72) and that was the practice. It was not until October 1922, when the $1,100,000 distribution here in question was under consideration, that the Secretary asserted a different authority by amending his regulations so as to provide that, "in such individual cases or classes of cases" as he might direct, the funds of minors and incompetents might "be paid direct to the Indians entitled thereto" or "otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases" (*idem*, p. 75). That amendatory regulation, we submit, is void because in excess of the Secretary's power, and the Government itself formerly so asserted (*idem*, p. 75, par. 13).

the Indian. The Circuit Court of Appeals failed to note the distinction between adult and competent Indians and minor and incompetent Indians; and while it reached the right result in this case, its process of reasoning is apt to do harm in other cases.

Application of the foregoing principles to the case at bar.

It is not our purpose to enter upon any discussion of the argument for the petitioner. We beg, however, to indicate very briefly how our views apply to the four questions stated at pp. 11, 12 of petitioner's brief as the "outstanding questions presented by the petition".

The first question there stated is whether the Secretary may unconditionally remove restrictions. The answer to that question is, we think, unquestionably "Yes".

The second question there stated is whether the Secretary "can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary" and whether the Secretary "may lawfully transfer to said wife said fund upon request of said Indian". The answer to that question is, we think, unquestionably "Yes", *provided* the Indian is mentally competent to make such a gift and understands what he is doing. If the Indian be mentally *incompetent*, the Secretary still can "lawfully approve the request" but such approval does not effectuate a valid gift because of the mental incompetency of the donor, and the Secretary may not lawfully transfer the fund to the wife because the incompetency of the Indian makes it unlawful for him to transfer it to anyone other than a duly appointed guardian.

The third question stated by the petitioner is whether the "discretionary judgment" of the Secretary in the disposal of the fund in accordance with the request of the Indian is subject to be reviewed and controlled by the courts where there is no charge of fraud or deception. The answer to that question is that the only "discretionary judgment" which the Secretary has is upon the question whether he will or will not remove restrictions, and if the Secretary decide to remove the restriction (no fraud practiced *by* or *upon* him appearing) his act in so doing is conclusive and cannot be revoked or set aside by a court. We can conceive of circumstances under which the Secretary might be compelled by a court to remove restrictions, for otherwise an Indian might starve while the Secretary held his money; but if the Secretary remove restrictions and turn the fund over to or upon the order of an adult and competent Indian, or to the guardian of a minor or incompetent Indian, no court could interfere. If, however, the Secretary turn over the funds of a minor or incompetent Indian to *anyone other than his guardian*, then, of course, the courts could order a return of the fund because such act of the Secretary amounts to nothing other than giving away something that did not belong to him.

The fourth question stated by the petitioner is whether the degree of mental competence or incompetence of an Indian making a request for a disposal of a portion of his restricted moneys to his wife as a gift "limits, restricts or modifies the authority and power of the Secretary". The answer to that question is that the mental incompetence of the Indian, of course, does not in any way limit or restrict or modify the power of the Secretary to remove the restriction upon alienation, but such mental in-

competence does make it necessary for the Secretary, in case he decide to remove the restriction, to hand the fund over to a guardian of the incompetent, rather than to the Indian himself or to the person to whom the incompetent Indian is supposed to have "requested" that it be transferred, because a "request" by a mental incompetent is void and ineffective and legally non-existent.

Respectfully submitted,

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